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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 332

THE BOOKCASE, INC. and IRWIN WEISFELD,

Appellants,

against

HOWARD R. LEARY, as Commissioner of Police of the City of New York and FRANK S. HOGAN, as District Attorney of New York County,

Appellees.

APPELLANTS' BRIEF IN OPPOSITION TO MOTIONS TO DISMISS

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This brief is submitted in opposition to the motion of the appellee Leary to dismiss, and in opposition to the separate motion of the appellee Hogan.

Jurisdiction

The appellee Leary contends that the court lacks jurisdiction because "the judgment of the New York Supreme Court does not establish the constitutional validity of the challenged statutes" (a statement patently erroneous) and then is followed by the statement, "The judgment of that Court did no more than to reject plaintiffs' limited objections to the constitutionality of the statutes." This

strange and contradictory contention can only be understood if one pauses, in respect for its author, to analyze it. What appellee means, we assume, is that sometime there may be other challenges as to the constitutional validity of the statutes, and therefore, the judgment is not final.

But the appellee is mistaken. The appeal is from the final judgment of the Court of Appeals (not the New York Supreme Court). The Court of Appeals by its final judgment and opinion held that the statutes were not repugnant to the Constitution of the United States, as challenged by appellants, because a state, without offending the Constitution, may interfere with the distribution of literature based on the age of the purchaser. There is therefore before the court a final judgment of the highest court of a state sustaining the validity of a statute. That is all that 28 U.S.C. Section 1257(2) requires. *Republic Gas Co.* v. *Oklahoma,* 334 U. S. 62, 67. There is no requirement that a judgment to be final, must embrace and exhaust every constitutional contention that could possibly be made against a statute. If citation be necessary for such an obvious answer, the case of *Kingsley Books Inc.* v. *Brown,* 354 U. S. 436, also involving an attack on a New York statute, which was argued and decided at the same time with *Roth* v. *United States,* was expressly limited in brief and in oral argument both in this court and in the New York Court of Appeals to the question whether the statute was a prior restraint on publications. True, attacks as to the vagueness of the statute and the power of the state to censor "obscene" publications were inherent in that case, as they were in *Roth.* Appellant however chose to select and limit his range of attack. This court found no fault or lack of jurisdiction in such approach. Indeed, Section 1257(2) does not define "final" as meaning final in the sense of exhaustion of every possible question. It speaks only of a "final judgment." Life being what it is, Section 1257(2) does not demand the impossible.

This case is not an abstract one, as appellee Hogan asserts. First of all, that contention was not urged before the New York Court of Appeals and not at all involved in its decision. Indeed, at Special Term, *The Bookcase Inc.* v. *Broderick,* 49 Misc. 2d 351, the appellee had so urged, but fruitlessly. See also, *The Bookcase Inc.* v. *Broderick,* 49 Misc. 2d 355. That contention was abandoned by appellees in the Court of Appeals. That is why that court took jurisdiction of a direct appeal to it from a court of original jurisdiction, because there was no question involved other than the constitutional validity of a statute as required by C.P.L.R. § 5601(b)(2).

In this court, there is now a final judgment outstanding against the appellant which adjudicates that the statutes are not repugnant to the Constitution of the United States, and therefore, if the appellants were to sell the specific literature they possess, described in the complaint, to persons of a certain age, they would be subject to imprisonment for one year. This can hardly be deemed abstract. The appellants, as booksellers, are thus operating under a cloud whose chilling effect is even greater than this court observed in *Dombrowski* v. *Pfister,* 380 U. S. [redacted]. While *Dombrowski* had reason enough to be concerned about the consequences of the exercise of his First Amendment rights, these appellants have had even greater concern. Just before the enactment of the statutes they had been prosecuted, convicted, and penalized to 30 days imprisonment under a similar statute for selling the same literature to a person under 18 years of age. They were also subject to the threat of renewed prosecution, all of which is set forth in the complaint and in the opinion in the lower court in *The Bookcase Inc.* v. *Broderick,* 49 Misc. 2d 351. They did not care to risk prosecution again with subsequent vindication of their constitutional rights. They therefore instituted this action for a declaratory judgment, as provided by New York procedure. Indeed, for the purpose of avoid-

ing First Amendment hazards, that remedy has been prescribed by New York as most efficacious, *Bunis* v. *Conway*, 17 A. D. 2d 207; *The Bookcase Inc.* v. *Broderick*, 49 Misc. 2d 351.

The Question is Substantial

The Statement as to Jurisdiction fully presents and we believe, persuasively supports the substantiality of the question raised.

The motions should be denied and probable jurisdiction should be noted.

Respectfully submitted,

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